

## **FAIR EMPLOYMENT AND HOUSING COMMISSION GUIDE TO THE HEARING PROCESS AND REPRESENTING YOURSELF AT HEARING**

The following guide is to help you prepare for your administrative hearing before the Fair Employment and Housing Commission (FEHC or Commission) on charges brought by the Department of Fair Employment and Housing. It contains general answers to questions often arising in Commission proceedings and is not a substitute for having an attorney advise you. This guide does not address the merits of your case. It only addresses various procedural matters that may arise if you choose to represent yourself at hearing.

### **What is the Fair Employment and Housing Commission (FEHC or Commission)?**

The Fair Employment and Housing Commission is made up of seven Commissioners appointed by the Governor <http://www.fehc.ca.gov/aboutus.asp>, and a San Francisco-based full-time staff, headed by the Executive and Legal Affairs Secretary <http://www.fehc.ca.gov/aboutus.asp#Noel>. The Commission also employs Administrative Law Judges who conduct hearings on its behalf, a Clerk of the Commission, and support staff.

### **What law governs Commission procedures?**

The Commission was established by the Legislature to hold hearings under the Fair Employment and Housing Act (FEHA), in addition to other duties. The FEHA is set out at California Government Code section 12900 and the sections immediately following [http://www.fehc.ca.gov/pdf/FEHA\\_Outline.pdf](http://www.fehc.ca.gov/pdf/FEHA_Outline.pdf). The procedural rules for FEHC administrative hearings are set out in the Commission's Procedural Regulations, a copy of which was included in your accusation package and can also be found here [http://www.fehc.ca.gov/pdf/code\\_regulations.pdf](http://www.fehc.ca.gov/pdf/code_regulations.pdf).

### **Who will hear my case?**

Your case will be heard by an Administrative Law Judge (judge), who hears the case for the Commission. After hearing the evidence, and receiving the transcript, the judge will write a proposed decision.

### **What will my hearing be like?**

Your hearing is an adversary proceeding, like a court trial, with witnesses who testify under oath, exhibits and rules of evidence. The judge presides at the hearing and makes rulings on the admissibility of evidence. The Department of Fair Employment and Housing (DFEH), the agency prosecuting the case, is represented by an attorney (Staff Counsel). You have the right to be represented by an attorney, at your own expense. You also have the right to bring a representative to speak on your behalf, or you may choose to represent yourself. A court reporter makes a written record (a transcript) of the proceedings.

### **Who are the parties?**

The individual who initiated the case by filing a complaint with DFEH is called the “complainant.” The charging document in a case brought before the Commission is the “accusation,” which was filed and served by the DFEH. In the accusation, DFEH sets out the facts and legal bases for its charges, and the remedy sought. The party against whom the accusation is brought is the “respondent.”

Sometimes, a complainant asks to become a party to the proceedings. The process is called asking to “intervene.” When leave to intervene is granted, the complainant (or other intervenor) becomes a party to the action, and may choose to be represented by his or her own attorney in the Commission proceedings.

### **What should I do before the hearing starts?**

It is very important for you to read carefully the accusation, the amended accusation, if any, and all other documents served on you by DFEH prior to your hearing. While you are not required to, it is recommended that you consult with an attorney, in order to understand your rights, defenses, and all potential liabilities. Remember: file a timely Notice of Defense and keep DFEH and the Commission informed of any change of address.

As soon as you receive the Notice of Hearing from the DFEH, review it carefully so that you know precisely when and where the hearing is to take place. It is important that you appear at the hearing to present your side of the story and defend yourself.

### **What if I move?**

You must keep the DFEH informed of any change of address or telephone number, so that you can be contacted throughout these proceedings. This is required by law. (Cal. Code Regs., tit. 2, § 7403.)

### **What documents or other information about the case is available before the hearing?**

You have the right to request that the DFEH provide you with documents related to the alleged violations set out in the accusation, subject to certain legal exceptions and applicable privileges. (Cal. Code Regs., tit. 2, § 7417).

“Discovery” is used to refer to the exchange of information and documents by the parties before a hearing or trial. In FEHC cases, discovery is limited, compared to civil trials. Pre-hearing discovery by both sides in FEHC cases may include written requests for discovery, issuance of subpoenas and depositions.

Generally, a request for discovery must be made within 30 days of receiving the initial accusation and accusation package. Be sure to read the documents you receive from DFEH to verify the time you have to request discovery. Send a timely written request to the assigned DFEH Staff Counsel at the DFEH Legal Office which issued the Accusation. (The Staff Counsel’s name and address are generally provided in the upper left corner of the first page of the accusation.)

A “subpoena” requires witness to appear at a time, place and date specified in the subpoena. A “subpoena duces tecum” requires that specific, listed documents be provided. If you do not have an attorney, and are representing yourself, under California law, you may not issue subpoenas on your own behalf. You may, however, ask the Commission to issue a subpoena or subpoena duces tecum for you. How to request the issuance of a subpoena by the Commission is set out below in the section called “[How do I get subpoenas?](#)”

Depositions are an opportunity to ask questions of a party, while a court reporter transcribes what is said in a deposition transcript. Commission regulations limit depositions to one per party, unless there are multiple respondents. Proper written notice must be given of any deposition. Refer to the Commission regulations for specific information. (See Cal. Code Regs., tit.2, § 7417.)

In most cases, the Commission is not involved in pre-hearing discovery, and does not require the parties to file copies of their discovery documents. The exception is when a discovery dispute arises, and a motion to compel or limit discovery is filed with the Commission. (Cal. Code Regs., tit. 2, § 7417, subdivision (c).)

### **What is the pre-hearing conference?**

About a week before the hearing, the Commission will generally convene, by telephone, a pre-hearing conference. (Cal. Code Regs., tit. 2, § 7423.) You are required to file a pre-hearing statement (Cal. Code Regs., tit. 2, § 7422) prior to this conference. Usually, the judge holds the pre-hearing conference shortly after receipt of the pre-hearing statements. At the pre-hearing conference, you will have the opportunity to ask procedural questions, and to make any special requests, regarding scheduling of witnesses, need for interpreters or reasonable accommodation. The pre-hearing conference is generally tape-recorded and becomes part of the record of the case.

### **When and where do I file my pre-hearing statement?**

The pre-hearing statement must be filed with the Commission and served on the opposing party five business days before the start of the hearing. The Commission’s address is: FEHC, Clerk of the Commission, 455 Golden Gate Ave., Suite 10600, San Francisco, CA 94102. Courtesy copies may be sent by facsimile to the Commission, at (415) 557-0855. However, as with any documents submitted to the Commission for filing, the original must be mailed to the Commission with one copy, and an attached proof of service showing that the DFEH has also been sent a copy. (Cal. Code Regs., tit. 2, §§ 7406 & 7407.) Documents two-hole punched at the top of the page is requested, but not required. The Commission does not send back a file-stamped (“conformed”) copy to the parties, unless the party requests it, provides an extra copy (original plus two) and a self-addressed, stamped envelope.

### **What happens at the hearing?**

The hearing will commence at the location set out in the Notice of Hearing on the date and time noticed. At the beginning of the hearing, the DFEH staff counsel usually makes an opening statement. You also have the right to make an opening statement, either

immediately following the DFEH's or later, after the DFEH has presented its case. In the opening statement, parties have the opportunity to tell the judge what they intend to prove though the evidence they will present at the hearing.

After the opening statements, the DFEH usually offers its "pleading file" into evidence. The pleading file (Cal. Code Regs., tit. 2, § 7429, subd. (f)(8)) is offered by DFEH "for jurisdictional purposes" to show what documents have been served in the case.

Each side can then offer relevant evidence to prove its case. Evidence can be in the form of sworn testimony taken under oath at the hearing, and documents, such as business records, letters, or photographs.

The DFEH presents its evidence first. The DFEH staff counsel will ask questions on direct examination of its witnesses. After DFEH finishes, you have the opportunity to ask questions of the DFEH's witnesses on cross-examination. The DFEH staff counsel will have a second chance to ask questions on matters you brought up on redirect examination. Then you have a second chance to inquire on re-cross-examination.

Respondent presents evidence after DFEH has presented its case. As you finish with each of your witnesses, and your own testimony, the DFEH will have an opportunity to cross-examine each of your witnesses. You have a second chance to ask questions of each witness.

The DFEH may call rebuttal witnesses after you have presented your case. Rebuttal witnesses may only testify about issues brought up in your case. If the DFEH calls rebuttal witnesses, you may be allowed to call your own rebuttal witnesses to address the issues discussed by DFEH's additional witnesses.

Before the hearing closes, you must submit all evidence to the ALJ to consider.

### **What happens at the end of the hearing?**

At the conclusion of the hearing, parties may present oral closing arguments. The DFEH, which has the burden to prove that its allegations are true and that the FEHA was violated, has the opportunity to make the last comment.

The parties may also opt for written closings arguments, to be submitted at a later date. If so, a schedule will be set up to mail the written arguments.

Closing argument is your chance to summarize what the evidence has shown and why you should prevail in your case. It can address only those facts brought out in testimony or the documents that the judge received into evidence.

After the receipt of the transcripts and closing arguments, the judge will write a proposed decision. A copy of the proposed decision will be mailed to the parties. It will also be submitted to the full Commission for consideration at the next regularly scheduled Commission meeting.

**Who has the burden of proof to establish a violation?**

The onus, or “burden of proof,” to prove a violation of the FEHA is on the DFEH. However, if you assert an affirmative defense, you have the burden to prove that affirmative defense. The level of proof is generally the preponderance of the evidence, i.e., by more than 50% of the admissible evidence. However, if the DFEH seeks an administrative fine or civil penalty, it must establish that such a penalty is warranted by clear and convincing evidence.

**Can I get a copy of the hearing transcript?**

Transcripts of the hearing are available by ordering from the court reporter at the close of the hearing. The requesting party must pay the required fees.

**What kind of evidence should I bring to the hearing?**

Depending on your case, you may want to bring witnesses who know about the issues involved in the charges against you. You may also testify yourself. However, remember that only testimony offered under oath on the witness stand can be considered by the judge as evidence. Statements made that are not under oath are not evidence.

You can bring documents, such as employment contracts, leases, business records, letters, memoranda, timesheets, checks or payment records that may help you establish your defense. You must prove that the documents you submit are authentic.

Bring the original plus three copies. You may also bring photographs or other items that are relevant to your defense. Any such documents or photographs must be offered into evidence at hearing. If an objection is made to a question or document, and if the objection is upheld (or “sustained”) by the judge, it does not become part of the admitted evidence. If documents are received into evidence, they become part of the hearing record. You cannot take them home (so make sure you have made copies). Remember: Before the hearing closes, you must submit all the evidence you want the judge to consider.

**Can I settle without having to go to hearing?**

Cases often settle prior to hearing. Contact the DFEH Staff Counsel to see if you can work something out. If both sides agree that a judge assigned as a settlement judge would be helpful, you can contact the Commission in writing for possible assistance.

**How do I get subpoenas?**

As a respondent in an FEHC proceeding, you have the right to subpoena from individuals, businesses and government agencies relevant documents in their possession. Contact the Commission in sufficient time before your hearing date, in writing, to ask for the issuance of subpoenas duces tecum for documents and subpoenas to compel the attendance of witnesses with relevant testimony. You must provide the name of the witness, their business (if any), and describe in detail any documents you want produced. You must also provide the time and date you want the witness to comply.

The Commission will issue the subpoenas or subpoenas duces tecum and send them to you. It is then your responsibility to arrange service and to pay required fees. You

cannot serve subpoenas yourself – you must have someone else serve them. It is your responsibility to determine how to serve subpoenas correctly. (See Code of Civil Procedure, sections 1985-1985.4, for other important information.)

**What is Administrative Hearsay?**

“Hearsay evidence” is a statement made by someone other than a witness while testifying at hearing and that is offered to prove that the statement is true. (Evid. Code, § 1200.) The administrative hearsay rule permits the limited use of hearsay evidence at hearing. It can only be used to corroborate or explain other admissible evidence. (Cal. Code Regs., tit. 2, § 7429, subdivision (f)(4).)

**Will the Judge Allow Letters or Written Statements instead of Witnesses?**

Some letters and other documents may be admitted in evidence for limited purposes, such as for administrative hearsay. Generally, it is better to bring witnesses who can help present your side of the case and answer any questions raised. The judge needs to assess the credibility of witnesses, which includes observing their demeanor and manner of testimony at hearing. (Evid. Code, § 777.) The judge will not speak with witnesses, except at the hearing itself. Remember: This hearing is your chance to tell the judge your side. It is important to have your witnesses present at the hearing to testify.

If you do choose to offer testimony by declaration or affidavit, signed under oath, instead of by a “live” witness on the stand at the hearing, there are specific rules set out in the Commissions regulations on how to do this. Make sure you check the FEHC regulations. (Cal. Code Regs., tit. 2, § 7428.) You must first send a copy of the proposed affidavit to the DFEH Staff Counsel in a timely manner, at least 10 days prior to hearing, with a cover sheet informing the DFEH that you intend to offer it as evidence at hearing. If there is no objection, you may offer the declaration into evidence.

However, the opposing party may object and exercise its right to demand cross-examination. This must be timely, in writing, and it is your responsibility to check the rules to find out those deadlines. (Cal. Code Regs., tit. 2, § 7428.) The party offering the testimony must then produce the witness so that he or she can be cross-examined. Alternatively, if the witness can not come to the hearing, any use of the declaration or affidavit at hearing is limited to administrative hearsay, i.e., only to corroborate or explain other admissible evidence. (Cal. Code Regs., § 7429, subd. (f)(4).)

**If I Forget Something, Can I Send it to the Judge at a Later Time?**

Your chance to present evidence is at the hearing. Only in rare cases will the judge permit later evidence.

**What if I Can’t Attend the Hearing On the Days It is Set?**

You must show good cause to change a hearing date. If you cannot attend on the date and the time shown on your hearing notice, you need to contact the DFEH Staff Counsel to see if he/she will agree to the change and the proposed new hearing dates. Then contact the Commission, in writing, to request a continuance. Remember: You must have a good reason (“good cause”).

To request a continuance to a different hearing date, you must submit your request in a letter to the Commission, in writing, addressed to the Executive and Legal Affairs Secretary or the judge, if assigned. You must set out the reasons showing good cause. You must also state whether the DFEH has agreed with the continuance or has no objection. You must also, where possible, include new dates that have been agreed upon by DFEH.

**What if I don't go to the hearing?**

If you do not attend the hearing, and the DFEH establishes that you were properly served with the accusation and Notice of Hearing, the Commission has the authority to hear the case as a default. (Cal. Code Regs., § 7414, subd. (c).) Generally, the DFEH will proceed to try and prove its case. The FEHC regulations provide that any statements previously made by you may be used in a default proceeding. (Cal. Code Regs., tit. 2, § 7430.) The judge may issue an order adversely affecting you in a default hearing if the DFEH proves it has correctly served the accusation, accusation package, and Notice of Hearing. (Cal. Code Regs., tit. 2, § 7407, subdivision (e).)

**How do I ask for an interpreter?**

If you or one of your witnesses need a sign or language interpreter, you must immediately contact the Commission so that a qualified interpreter can be provided. Generally, a friend or relative cannot interpret for you.

**Will the hearing location be accessible to people with disabilities?**

If you or your witnesses require reasonable accommodation, please contact the FEHC or notify the judge, if assigned, so that appropriate arrangements can be made. The Commission complies with Rules of Court Rule 989.3

<http://www.courtinfo.ca.gov/rules/titlethree/title3-107.htm>

**Whom do I contact if I have questions about my case?**

Your opportunity to ask procedural questions of the judge prior to hearing is at the pre-hearing conference. See the earlier section on the Pre-hearing Conference.

The Clerk of the Commission may be contacted if you have questions regarding the filing of pleadings in your case, at the following address and telephone number:

Fair Employment and Housing Commission  
Clerk of the Commission  
455 Golden Gate Ave., Suite 10600  
San Francisco, CA 94102

Information (415) 557-2325  
FAX Line (415) 557-0855

Alternative formats for this guide and information about other means of access will be made available to those requesting it.

## **FORM**

SUBPOENA DUCES TECUM <http://www.fehc.ca.gov/pdf/Appendix-A.pdf>